Supreme Court, U.S.
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No. 92-936

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT KEITH NEELY,
Petitioner.
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT
COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

A. WHETHER A DISTRICT COURT MAY EXERCISE IT'S SUPERVISORY POWER TO DISMISS AN INDICTMENT BECAUSE OF MISCONDUCT BEFORE A JURY WHERE THE MISCONDUCT AMOUNTS TO A VIOLATION OF SPECIFIC RULES ENACTED BY CONGRESS TO ENSURE THE INTEGRITY OF THE GRAND JURY'S FUNCTION AND WHERE A WITNESS CALLED BY THE GOVERNMENT HAS WILFULLY FAILED TO STATE MATERIAL FACTS WHEN CALLED UPON TO ANSWER?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, is an unpublished opinion dated June 8, 1992. [See Pet. App., Appendix 1.]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

18 U.S.C. 1622 Subordination of perjury, and 18 U.S.C. 1623 False declarations.

STATEMENT OF THE CASE

Petitioner adopts his Statement of the Case previously filed, but wishes to augment it because Respondent's brief misapprehends the central issue.

To characterize this as a case about the failure to present exculpatory evidence is error. This case concerns grand jury perjury. The trial judge recognized that there would not have been an indictment if the prosecution had presented the truth to the grand jury. This led to the dismissal.

The grand jury was investigating the acquisition of grand jury information by Mr. Neely from Court Reporter Bassett. Bassett was interviewed by federal agents. That interview was memorialized in a written report.

> In the grand jury, the prosecutor asked Agent Fayed:
> "Q. Can you tell us what the agents found out by interviewing Ms. Bassett and when that happened?"
> [Pet. App. 31]

He said that Ms. Bassett was interviewed on October 31, 1990. He then read the report to the grand jury. The agent read the report almost verbatim from "... she'd known Keith Neely for approximately ten years..." to "...after she received this information from Cotton..." [Pet. App. 31-34]. At this point, he misled the grand jury into believing that that was "basically" it. That was not "basically a summary of it." [Pet. App. 34].

Comparing this testimony to the report set out in Pet. App. 21-25, makes it clear beyond peradventure that the agent deliberately misled the grand jury. He deliberately and willfully omitted telling the grand jury the following:

> "BASSETT indicated that NEELY never solicited information from her, and she furnished the information to NEELY because of their long-standing relationship.
>
> BASSETT specifically denied that NEELY had ever given her marijuana, or anything else, in exchange for the information concerning FGJ proceedings." [Pet. App. 25] (emphasis added)

The omitted portion was the gravamen of "...what the agent

found out by interviewing Ms. Bassett...". The answer, as given, deliberately deceived the grand jury on whether or not Mr. Neely had obtained information by bribery or other undue influence. The truth is that Bassett had offered the grand jury information unasked. As the trial court recognized, had the grand jury known the truth, there would have been no indictment. The prosecutor knew the truth. The witness knew the truth. The prosecutor asked the witness a question that should have elicited the truth, i.e., when Bassett was interviewed, she told the agent that she had given the information on her own without request or influence. Misleading the grand jury by a deceptive response to such a clear question is perjury.

REASONS FOR GRANTING THE WRIT

United States v. Williams, 112 S.Ct. 1735, (1992), recognized that Court's supervisory power can and should be exercised to improve the truth finding process and to prevent parties from reaping the benefit of or incurring harm from violations of substantive or procedural rules imposed by the Constitution and laws. Id. 112 U.S. 1735, at 1741. This Court

also recognized that Bank of Novia Scotia v. United States, 487 U.S. 250 (1988) made it clear that "...the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury at least where that misconduct amounts to a violation of one of those 'few clear rules which were carefully drafted and approved by this Court and by Congress to insure the integrity of the grand jury function..." (emphasis added.) Id. at 376 citing United States v. Mechanik, 475, U.S. 66 74 (1986) (O'Connor, J. concurring in judgment.)

This case is precisely that category of case acknowledged in Williams, supra. The trial court recognized that the indictment was obtained in violation of a clearly promulgated rule and dismissed it.

Perjury is prohibited by 18 U.S.C. Section 1623. Subornation of perjury before a grand jury is prohibited by 18 U.S. C. Section 1622.

When a grand jury witness gives a false answer, it need not mislead. All that is necessary is that it be "capable" of influencing the tribunal. United States v. Abrams, 568 F.2d 411 (5th Cir. 1978), cert. denied (U.S.) 57 L.ed. 2d 1133, 98 S.Ct. 3089. In the

case presented here, the answer was "capable" of influencing and actually influenced them. Grand jury perjury, is a clear violation of a recognized rule. United States v. Friedhaber, 856 F.2d 640 (4th Cir. 1988).

The federal agent was asked what had been learned from the interview. The question was clear; the answer misleading. It did not say that the agent had learned from the interview that Neely had done nothing to obtain the grand jury information. She gave it to him on her own initiative. This question and answer was as much perjury as the question and answer in United States v. Beitling, 545 F.2d 1106, 1111 (8th Cir. 1976). [clear question, misleading answer, conviction sustained despite a long response which was somewhat more explanatory].

The prosecution cannot allow perjurious statements to go uncorrected. Napue v. Illinois, 360 U.S. 264, 269, (1959). When a prosecutor knows the truth and allows a misleading answer without correction, that violates 18 U.S.C. Section 1622.

This Court has long recognized, as Mr. Justice Scalia said in Williams, supra, that Courts have the authority to dismiss indictments obtained in violation of clearly existing rules or laws.

This indictment was obtained in violation of such rules and laws. The brief in opposition is in error when it suggests that Mr. Neely must go through the expense, rigors, and anxiety of a trial, possible conviction and incarceration pending appeal, and then, some years down the road be vindicated after he has lost everything. The trial court should be sustained summarily or this Court should grant this Petition, hear this case, and make it quite clear that prosecutors cannot obtain indictments by violating the rules and law as occurred in this case.

CONCLUSION

Our system cannot operate with a double standard. An answer which misleads the grand jury about the truth is perjury. Indictments resting on such a foundation must be dismissed. We have to live up to our principles if we are to be a society ruled by law, not men.

Respectfully submitted,

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